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In The

Supreme Court of the United States

October Term, 1993

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO. INC., JOAN L. WHITE, d/b/a D.A. White Enterprises, Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

vs.

FAIRFIELD COMMUNITIES, INC., a Delaware corporation; and COLORADO LAND TITLE COMPANY, a Colorado corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress, in amending 28 U.S.C. s 1447(c) in 1988, intend to abolish the "frivolous or bad faith" standard for assessing attorney fees against a defendant whose removal of a case from State court to Federal court resulted in remand, when the amendment granted specific authority to allow such attorney fees entirely free from the former standard of "improvidence", which was deleted from the statute as amended?

2. Did the court of appeals err in approving a "frivolous or bad faith" standard for allowing attorney fees under 28 U.S.C. s 1447(c), in view of Congressional intent to abolish that standard, disclosed by the 1988 amendment and by the objectives of Congress reflected in the legislative history of the Judicial Improvements and Access to Justice Act of 1988?

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No. _____

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Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

vs.

FAIRFIELD COMMUNITIES, INC., a Delaware corporation; and COLORADO LAND TITLE COMPANY, a Colorado corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Phyllis G. Daleske, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals filed on February 28, 1994, is designated for publication but is not yet published. It is contained in the attached Appendix at page A-1. The district court's unpublished Order of Remand to State court is at page A-1, of the Appendix, while the district court's oral denial of attorney fees is at page A-14, of the Appendix.

JURISDICTION

The judgment below was entered on February 28, 1994.[1] Jurisdiction is conferred on this Court by 28 U.S.C. s 1254(1).

STATUTE INVOLVED

28 U.S.C. s 1447(c), including its amendment by Section 1016 of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, 102 Stat. 4669, provides as follows:

s 1447. Procedure after removal generally

. . . .

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30

[1] All parties to the proceeding below are named in the caption. There are no parent companies or non-wholly owned subsidiaries of any of the petitioners.

days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

. . . .

Prior to its amendment in 1988, Section 1447(c) provided:

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT OF THE CASE

Petitioners are owners of residential development lots located near Pagosa Springs, in southwestern Colorado, who sued the developer, respondent Fairfield Communities, Inc., on behalf of a large class of lot owners in the local State court on July 21, 1993.[2] Petitioners sought a

[2] Respondent Colorado Land Title Company was Fairfield's land and title agent who was co-signatory on the

declaratory judgment that they had valid State law defenses against Fairfield's claims against them for payment of annual recreation fees, and for recovery of refunds and damages. Since Fairfield had emerged from Chapter 11 bankruptcy by confirmation of its plan of reorganization and an order of discharge on August 14, 1992, petitioners' money claims were limited to post-confirmation/discharge events. (App. at A-9-10).

On August 20, 1993, Fairfield filed a notice of removal to the United States District Court for the District of Colorado, located many miles away in Denver, invoking Federal bankruptcy jurisdiction under 28 U.S.C. s 1334, which grants to district courts original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11 (the bankruptcy statutes). (App. at A-4).

On September 16, 1993, the district court specifically found that the State case did not arise under nor was it related to any cases under title 11, also stating that "[p]laintiffs' State court complaint relies on and involves Colorado State law, on significant legal issues of first impression which the State courts should normally decide." (App. at A-10). The court ordered a remand back to State court based on its lack of subject matter jurisdiction under 28 U.S.C. s 1334. The court, however, denied petitioners' request under 28 U.S.C. s 1447(c), and under bankruptcy rule 9011 (the counterpart to Rule 11,

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Supplemental Declaration of Restrictions which authorized Fairfield to assess annual recreational fees non-uniformly, in conflict with the original restrictions.

Fed.R.Civ.P.), for expenses and attorney fees incurred due to the removal. (App. at A-11-14).

In denying petitioners' request, the district court stated:

> I find that there was a *good faith basis* for the removal, and that even though substantial attorney's fees were incurred, there was a *fair basis* for the position that was taken by counsel. Therefore, the request for attorney's fees is denied. (Our emphasis) (App. at A-14)

Petitioners timely appealed the order denying their request for expenses and fees to the Court of Appeals for the Tenth Circuit, asserting that the district court had employed the wrong test or standard required by the 1988 amendment to 28 U.S.C. s 1447(c). That amendment added a proviso authorizing allowance of actual expenses, including attorney fees, in addition to "just costs" in connection with an order of remand. The same amendment deleted from the statute its former requirement that defendant must have removed "improvidently" before costs could be allowed to the other party. (Statute Involved, supra, at p. 3).

The court of appeals first rejected Fairfield's argument that 28 U.S.C. s 1447(c) did not apply to a removal under 28 U.S.C. s 1452 invoking bankruptcy jurisdiction under 28 U.S.C. s 1334. (App. at A-4-7). The court then held that Congress' deletion of "improvidently" as a requirement for awarding costs merely "negate[d] any requirement that the removal be in bad faith before fees can be awarded." (App. at A-7). From this premise, the court approved the district court's standard denying attorney fees based on the district court finding that

Fairfield acted in "good faith and had a fair basis" for removing the case.

The foregoing standard utilized by the courts below is more often described as the "frivolous or bad faith" standard, in which attorney fees are allowable if a party's conduct is frivolous or in bad faith. The district court, and the court of appeals, merely stated the same standard conversely, that attorney fees are *not* allowable if the party's conduct has a fair basis and is in good faith.

Because the "frivolous or bad faith" standard is not found in nor suggested by any language in 28 U.S.C. s 1447(c), nor in its legislative history, and because that standard was apparently rejected by Congress when it deleted the word "improvidently" from the statute, petitioners seek review by this Court of the court of appeals' construction of this important Federal statute.

ARGUMENT

I. In Rendering Meaningless the 1988 Amendment of 28 U.S.C. s 1447(c), the Court of Appeals has Decided an Important Question of Federal Law Incorrectly, which has not been, but should be, Settled by this Court

This Court's recent rejection of the "frivolous or bad faith" standard for allowance of attorney fees under 17 U.S.C. s 505, in *Fogerty v. Fantasy, Inc.*, ___ U.S. ___ (No. 92-1750, March 1, 1994), requires rejection of that standard in any comparable Federal attorney fee statute. The 1988 Amendment of 28 U.S.C. s 1447(c) and its legislative history, even more clearly compel that result in this case.

The 1988 amendment to Section 1447(c) was part of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, s 1016, 102 Stat. 4669. The amendment made two significant changes. Whereas previously the statute had only allowed an award of costs against a defendant removing a case "imp ɔvidently and without jurisdiction", the 1988 amendment deleted the word "improvidently", and then added the authority to allow expenses including attorney fees (in addition to "costs") whenever a case was remanded on any ground. The objective of Congress was evidently to discourage attempted removal of State cases to Federal courts by authorizing assessment of expenses and attorney fees, upon remand for lack of jurisdiction or other defect, against a defendant who forced a State court plaintiff to litigate in a second court over a marginal question of Federal jurisdiction. In this context, Congress sought to alleviate the continuing problem of Federal court congestion.[3] By deleting the prior requirement that a defendant's removal be "improvident" before costs could be assessed, Congress also must certainly have intended

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[3] The Statement of Legislative History found in H.R.Rep. 100-889, 100th Cong., 2nd Sess. 1988, for Pub.L. 100-702, Cong. Record Vol. 134 (1988), made this pertinent observation:

> The general mandate of our court system is to secure "just, speedy and inexpensive determination of every action." . . . the Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support services; spiraling costs caused by litigation expenses and attorneys' fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.

district courts to allow costs, expenses and attorney fees without having to apply the "frivolous or bad faith" standard implicit in the prior "improvident" requirement.

The decision below construes the 1988 amendment of 28 U.S.C. s 1447(c) as merely negating "any requirement that the removal be in bad faith" for a district court to allow attorney fees upon remand of the case to State court. (App. at A-7). The court failed to hold that the 1988 amendment negated the old "frivolous" standard, and thus approved a standard requiring a removal to be "frivolous" (without a "fair basis") in order for the district courts to allow attorney fees.

This holding renders the 1988 amendment entirely meaningless because it was settled law prior to 1988 that courts had inherent power without statutory authority, as an exception to the American rule, to allow attorney fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ' " *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240, 258-259 (1975).

Moreover, after 1983, Rule 11, Fed.R.Civ.P., authorized allowance of attorney fees even absent bad faith if a party's pleading is not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extent, modification, or reversal of existing law", *or* if it is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11 also imposed a duty of reasonable inquiry, permitting an attorney fee allowance "even in the absence of bad faith." *News-Texan, Inc. v. City*

of Garland, Tex., 814 F.2d 216, 220 (5th Cir. 1987). Construing the word "improvidently" in Section 1447(c) prior to its amendment, the Fifth Circuit held that "the language of section 1447(c) *does not require bad faith as a precondition to an award of costs.*"(Our emphasis) Id. at 220. In accord is *Bucary v. Rothrock*, 883 F.2d 447, 449, n.2 (6th Cir. 1989), also holding that the "improvidence" standard for allowing costs under 1447(c) was less stringent than the "bad faith" standard for awarding attorney fees.

Thus, the pre-amendment decisions held that attorney fees were not allowable on remand where "the defendant's attempt to remove the action was *fairly supportable* and where there has been *no showing of bad faith.*" *Schmitt v. Insurance Co. of North America*, 845 F.2d 1546, 1550 (9th Cir. 1988). (Our emphasis). Indeed, the Tenth Circuit itself had recognized in 1981 that attorney fees would be allowable on remand under the "bad faith" exception to the American rule, *Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981), and that the "improvidence" standard in Section 1447(c) allowing assessment of just costs "is clearly less stringent than the 'bad faith' standard that must be met in order for a court to award attorney's fees in cases of this nature." While denying attorney fees because "bad faith" was absent, the court allowed "just costs" because the trial court's finding of "frivolousness" was equivalent to Section 1447(c)'s "improvidence" standard. Id. at 687.

Inexplicably, the court below failed to consider the foregoing cases which petitioners urged upon the court, (Brief of Appellant at 10-11), and the court misconstrued later cases from other circuits applying Section 1447(c) as amended in 1988. (App. at A-7). By this means, the court

concluded that Congress' deletion of "improvidently" as a standard for awarding costs merely negated a "bad faith" standard; but did not negate the less stringent "frivolous" standard. Accordingly, the court held, if defendant is in good faith, and has a "fair basis" for its removal, attorney fees are not allowable. This holding renders the 1988 amendment entirely without practical effect. Attorney fees had been allowable previously for a "bad faith" removal without statutory authority, and the statute's "improvidence" standard for allowing costs was equivalent to a "frivolous" standard. "Frivolous" is different than and less stringent than bad faith. Hence deletion of "improvidently" as a standard had the necessary effect of abolishing the former "frivolous" standard, and thus broadening the right to attorney fees as well as costs. Under the 1988 amendment, therefore, the standard is no longer whether defendant's removal was improvident or frivolous, but rather whether the objectives of Congress in authorizing attorney fees free from the earlier standard are to be considered and implemented.[4]

This Court's March 1, 1994, decision in *Fogerty v. Fantasy, Inc.*, No. 92-1750, 1994 WL 57023(U.S.), setting the standard for awarding attorney fees in Federal copyright cases, was entered one day after the lower court's February 28, 1994, decision herein. In stark contrast to

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[4] "[Section 1447] does not require a showing that the removal was 'frivolous' or 'vexatious' or lacked an 'objectively reasonable basis' as required for sanctions on other theories." Moore v. Kaiser Foundation Hospitals, Inc., 765 F.Supp. 1466, 1465 (N.D.Cal. 1991), aff'd, 981 F.2d 443 (9th Cir. 1992), quoting Schwarzer, Tashima and Wagstaffe, Civil Procedure Before Trial, 2:1110.

this Court's rejection of the "frivolous or bad faith" standard for awarding statutory attorney fees, in favor of an even-handed implementation of the objectives of Congress in enacting a statute, the court of appeals has endorsed the district court's application of a "frivolous or bad faith" standard for awarding expenses and attorney fees in all cases remanded back to State courts, including those remanded for lack of Federal subject matter jurisdiction. The district court, and the court of appeals, expressed that standard in converse terms, namely that fees are *not* allowed when a removing defendant acted in "good faith and had a fair basis" for the removal (App. at A-7). This is precisely the other side of the coin, that fees *are* allowed when defendant acts in bad faith or frivolously. Conduct is frivolous if it does not have a "fair basis". *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (A pleading is frivolous where it lacks an "arguable basis".)

In *Fogerty v. Fantasy, Inc.*, supra, this Court found nothing in the copyright statute or its sparse legislative history to warrant application of the "frivolous or bad faith" standard for awarding attorney fees. There is likewise nothing in the 1988 amendment to Section 1447(c) which remotely suggests such a standard. On the contrary, Congress' deletion of the word "improvidently" previously found in Section 1447(c), directly indicates a firm rejection of the "frivolous or bad faith" standard. Congress was well aware in 1988 that attorney fees could be awarded under Rule 11. The legislative history, H.R.Rep. 100-889 (see Part III, Title X), demonstrates that Congress intended to establish a "different standard for judging the award of expenses under section 1447(c) and

sanctions under Rule 11." *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

Yet in the present case, the Tenth Circuit holds that "improvidence" means only "bad faith", and thus that its deletion from 1447(c) did not affect the "frivolous" standard previously required for an award of costs – even though prior decisions equated "improvident" with "frivolous". If the prior decisions are correct, then Congress' removal of "improvidently" obviously intended to remove the "frivolous" standard previously utilized for the award of "just costs", in connection with post-1988 allowance of costs, expenses and attorney fees. *Thus, when Congress deleted that term, it must have intended to allow attorney fees even in cases in which a defendant may have had a fair basis, acting non-frivolously, for a removal.*

The 1988 amendment of Section 1447(c) far more clearly rejects the "frivolous or bad faith" standard for allowing attorney fees, than did the attorney fee proviso in 17 U.S.C. s 505 construed by this Court in *Fogerty v. Fantasy, Inc.*, No. 92-1750, decided on March 1, 1994. The copyright statute authorized attorney fees to the prevailing party, whether plaintiff or defendant, and contained no language suggesting a requirement of frivolous or bad faith positions by the losing party. In the removal statute here involved, the prior "improvident" requirement which did require conduct equated to frivolousness, was expressly deleted as a requirement to award just costs, and Congress then added a provision for expenses and attorney fees in addition to costs. An apparent objective of Congress was to discourage defendants from attempting removal in marginal cases where jurisdiction might be debatable; and to encourage cases properly filed in

State courts to remain there for adjudication. And another specific objective implicit in the amendment itself was to allow assessment of expenses and attorney fees against a removing defendant in favor of the plaintiff who was forced to litigate in a second court over Federal jurisdiction, often at a distant location.

This Court now requires district courts, in considering allowance of attorney fees authorized by certain other Federal statutes, to exercise an "equitable discretion" effectuating the objectives of Congress; and rejects the "more stringent [frivolous or bad faith] standard", applied by the lower courts to copyright defendants. *Fogerty v. Fantasy, Inc.*, supra.

On the other hand, this Court has also provided another standard in connection with the statutory allowance of Federal court costs. 28 U.S.C. s 1920, states that the court "may" tax as costs a variety of expenses. Fed.R.Civ.P. 54(d), which implements Section 1920, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Under that Rule, costs which "may" be awarded are normally awarded as a matter of course unless good reason or exceptional circumstances are presented. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 112 S.Ct. 3025.

Such a rule would also seem appropriate in awarding costs and fees under Section 1447(c), because it would implement the intent of Congress in a simple and direct manner which could be easily understood by litigants and courts alike. That standard would tend to discourage

inadvisable removals such as in this case, and thus lighten the burden on Federal courts. Such a standard would also be appropriate because Section 1447(c), unlike other Federal attorney fee statutes, allows an award only in favor of one side, the non-removing party, in order to carry out important procedural objectives of Congress which are not present in other substantive statutes, such as the copyright law. Moreover, historical precedent supports this standard in removed cases. Section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, directed the then circuit courts to make such order as to costs, in remanding a removed case, as shall be just. Thereafter, this Court uniformly ordered costs to be allowed as a matter of course against the removing party when cases were remanded for lack of Federal jurisdiction. E.g., *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 386-387 (1884); *Torrence v. Shedd*, 144 U.S. 527, 533 (1892).

In any event, whether the proper standard here is the "equitable discretion" to implement the objectives of the statute, as in *Fogerty*; or whether it is the standard adopted in Rule 54(d), there is no justification for the lower court's adherence to the frivolous or bad faith standard for allowing attorney fees (which the court expressed, conversely, as the "fair basis or good faith" standard for disallowing attorney fees). The latter standard is inconsistent with the intent of Congress, and does not carry out the objective of Congress in amending Section 1447(c).[5]

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[5] The court of appeals' further conclusion that Fairfield's removal had a "fair basis", i.e., was not frivolous because petitioners' State law action was arguably related to Fairfield's

Few, if any, Federal statutes authorizing attorney fees will have as broad and continuing an impact in such a wide variety of cases as the 1988 amendment to 28 U.S.C. s 1447(c). The statute encompasses all cases, both diversity of citizenship and Federal law questions, attempted to be removed from State to Federal courts but which are remanded. Every district court will be faced with this

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Chapter 11 bankruptcy, from which Fairfield had long since emerged under a confirmed reorganization plan, can be described as charitable at best. Petitioners' State law action sought validation of defenses against claims made by Fairfield against them, in the form of a declaratory judgment, and limited any money claims against Fairfield to post-confirmation, post-discharge, events. Since petitioners' defenses to money claims by Fairfield do not constitute dischargeable claims against the debtor, 11 U.S.C. s 101(5), Fairfield had no basis for asserting Federal bankruptcy jurisdiction over such State law defenses. The bankruptcy order of confirmation did not purport to retain jurisdiction over Fairfield's claim to a recreation fee from petitioners. The only comparable case cited to the lower courts was a well-reasoned district court opinion firmly rejecting Federal bankruptcy jurisdiction over such State law, post-confirmation, litigation in State courts. *In re Transamerican Natural Gas Corp.*, 127 B.R. 800 (S.D.Texas 1991).

'Not content with its unsuccessful removal, Fairfield for a second time invoked the same bankruptcy jurisdiction under 28 U.S.C. s 1334 in a declaratory judgment and injunction action brought against petitioners in the United States Bankruptcy Court, Eastern District of Arkansas, Western Division (No. AP934142, filed in Fairfield's Chapter 11 case, No. 90-42092F). Fairfield's second attempt violates 28 U.S.C. s 1447(d), prohibiting review of an order of remand "by appeal or otherwise", and is barred by res judicata as well, *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166 (5th Cir. 1986), but delay and expense to petitioners continue to mount.

issue from time to time. It is important that this significant amendment, as part of the Judicial Improvements and Access to Justice Act of 1988, be correctly interpreted and applied. This important question of Federal law has not been, but should be, settled by this Court.

II. The Decision Below is in Conflict with Decisions by the United States Courts of Appeals for Other Circuits

The lower court cited three cases, incorrectly, to support its novel holding that Congress' deletion of "improvidently" merely negated a supposed requirement of "bad faith" in order to allow attorney fees. (App. at A-7). This conclusion left the court free to approve a standard that fees were not allowable if the removal had a "fair basis", the identical standard, conversely stated, that fees are allowable only if the removal is frivolous. Ironically, none of the three cases so hold. Two of them are in direct conflict with the decision below, while the third is in substantial conflict. While these cases, in affirming attorney fee awards, did reject arguments by defendants that "bad faith" was required to allow such fees, none of the cases purported to limit the effect of the 1988 amendment to that point, as the Tenth Circuit does. The difference is critical.

In *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 971 F.2d 917 (2nd Cir. 1992), the court affirmed an award of attorney fees by the district court, whose test for awarding fees was the "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties." (971 F.2d at 924). The court of

appeals found this test sufficient under the circumstances, relying on Congress' deletion of "improvidently" in its 1988 amendment to 1447(c). The statute as amended focuses "strictly on the mere absence of subject matter jurisdiction." The court considered "such sharply different wording to have been a deliberate choice by Congress." 971 F.2d at 923. While the court rejected defendant's bad faith defense, there is nothing in the opinion to indicate that Congressional deletion of "improvidently" was limited to removing "bad faith" as a pre-requisite to a fee award. Indeed, the district court had found that defendant's removal, prior to 1988, was neither "improvident" nor in "bad faith" (971 F.2d at 922), so the issue was whether the 1988 amendment applied to allow attorney fees for the period after the amendment. (971 F.2d at 921-922). This decision is consistent with and supports the cases discussed in Part I, supra, holding that "improvidence" was a distinct and different standard than "bad faith". The district court standard as affirmed by the Second Circuit, was not based on the "frivolous" standard the Tenth Circuit now embraces; but rather upon broader policies consistent with the objectives of Congress in amending 1447(c).

In *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992), the court noted the significant fact that before Congress amended 1447(c), attorney fees were allowable under Rule 11, whose pre-1983 bad faith standard had been replaced by an objective standard of reasonable inquiry. Thus, when Congress deleted the "improvident" requirement from 1447(c) in 1988, it intended to broaden the existing right to attorney fees. (981 F.2d at 447). The court rejected defendants' argument

that bad faith was required and that the same standard should apply to Section 1447(c) as to Rule 11:

> . . . The House Report [No. 100-889] in fact demonstrates that there is a different standard for judging the award of expenses under section 1447(c) and sanctions under Rule 11. . . . As the district court stated, "[t]he court's award of fees in this case is not a punitive award against defendants; it is simply reimbursement to plaintiffs of wholly unnecessary litigation costs the defendant inflicted." (981 F.2d at 447).

Again, while defendant's "bad faith" defense was rejected, the opinion plainly holds that Congress intended to broaden the right to attorney fee awards in the 1988 amendment. This is consistent with the commentary by Professor Siegel in 28 U.S.C.A. s 1447 (P.62, West Supp. 1993) that expenses and attorney fees are to be "based on the nature of the removal and the nature of the remand."

Yet the Tenth Circuit, apparently looking only at the rejection of defense arguments that "bad faith" was a requisite in the foregoing cases, erroneously held that the effect of deleting "improvidently" was to negate an assumed requirement of bad faith. But in fact, deletion of the improvidence standard negated any requirement that the removal be found "frivolous" (i.e., without a fair basis or arguable basis). This conclusion is logically inescapable because attorney fees had previously been available upon a finding of bad faith, but not when removal was merely frivolous or without a fair basis. Only deletion of the improvidence standard, and expressly adding a right to attorney fees, could abolish the "frivolous or

bad faith" standard, just as the 1988 amendment provided. The court of appeals' decision, failing to broaden the standard for an attorney fee allowance beyond the old "frivolous" requirement, renders Congressional amendment of 1447(c) entirely redundant.[6]

The third case cited by the decision below to support its novel holding is *Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238 (6th Cir. 1993). This case also affirmed a district court award of attorney fees as "fair and equitable" where the remanded State court case was based on State law, and the Federal court had no jurisdiction under ERISA, 29 U.S.C. s 1140. A finding of "improper purpose" was not necessary to support an award under amended Section 1447(c). Although not as definitive as the Second and Ninth Circuit cases, *Morris* is consistent with them.[7]

The court's reliance on a fourth case, *Miranti v. Lee*, 3 F.3d 925 (5th Cir. 1993) (App. at A-8), is not warranted because it is factually distinguishable. At the time of removal, diversity jurisdiction existed, but later the

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[6] After approving the district court's denial of expenses and attorney fees based on its finding that Fairfield had a "fair basis" for its removal, the court of appeals in its final conclusion used the term "legitimate basis". (App. at A-8). The two phrases seem to be equivalent and interchangeable, both being substantially the same as "non-frivolous". Compare, Neitzke v. Williams, 490 U.S. 519, 525 (1989).

[7] After citing the foregoing three cases, the court below concluded that "if the district court had refused to award fees in the absence of evidence of bad faith, it would have employed an incorrect legal standard." (App. at A-7). We presume this was an unintended grammatical misstatement of its holding, but the literal illogic of this statement illustrates conceptual problems implicit in a standard so at odds with congressional intent.

defendant insured was dropped as a party, leaving only the insurer as party defendant, whose liability exposure was less than $50,000, the jurisdictional amount. The district court ordered a remand, and allowed attorney fees to plaintiff. The Fifth Circuit reversed the fee allowance on the ground that removal was reasonable when filed, but affirmed the award of costs. This was a markedly different situation than that in our present case, where Federal bankruptcy jurisdiction never existed. However, in describing the district court award of attorney fees as an "imposition of sanctions" (3 F.3d at 927), and in concluding that such sanctions required a different standard than the imposition of "just costs" (3 F.3d at 929), the Fifth Circuit's dicta arguably supports the Tenth Circuit in requiring "frivolous" conduct to warrant assessing fees against defendant in an action remanded for lack of Federal jurisdiction.

The decision below is especially egregious because it purports to follow cases from other circuits which are, in reality, in conflict with it. The precedent established will be followed by district courts and looked to by other courts, with the result that the important objectives of Congress in amending Section 1447(c) will not be implemented. Therefore, the correct standard to be utilized by district courts in applying 28 U.S.C. s 1447(c) should be settled by this Court.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO., INC., JOAN L. WHITE, doing business as D.A. [sic] Enterprises, Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development," which were sold by Fairfield after March 1, 1983,	)	No. 93-1376 (Filed Feb. 28, 1994)
Plaintiffs-Counter-Claim-Defendants-Appellants,	)	
v.	)	
FAIRFIELD COMMUNITIES, INC., a Delaware Corporation,	)	
Defendant-Counter-Claimant-Appellee,	)	
and	)	
COLORADO LAND TITLE COMPANY, a Colorado Corporation,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-N-1767)

Submitted on the briefs:

Gerald Sawatzky, Foulston & Siefkin, Wichita, Kansas, for Plaintiffs-Counter-Claim-Defendants-Appellants.

Gregory M. Gordon and Robert H. Stone of Jones, Day, Reavis & Pogue, Dallas, Texas, Keith Newbold of Shand, McLachlan & Newbold, Durango, Colorado, for Defendant-Counter-Claimant-Appellee Fairfield Communities, Inc. and Defendant-Appellee Colorado Land Title Company.

Before TACHA and BRORBY, Circuit Judges, and BROWN,* Senior District Judge.

BRORBY, Circuit Judge.

Plaintiffs-appellants appeal the district court's denial of their request for attorney's fees and costs stemming from the removal and remand of their state court lawsuit against defendant-appellee Fairfield Communities, Inc.[1]

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* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

Because the court did not use an incorrect legal standard and did not abuse its discretion in denying fees and costs, we affirm.

Fairfield Communities, Inc. (Fairfield) is currently operating under a plan of reorganization confirmed by the United States Bankruptcy Court for the Eastern District of Arkansas in August 1992. Plaintiffs-appellants are a class of approximately 2,000 property owners who bought their lots from Fairfield or its predecessors, and who are now seeking to invalidate a restrictive covenant requiring the payment of maintenance fees and reimbursement of certain fees collected thereunder. The restrictive covenant was placed on their lots in August 1983, seven years before Fairfield declared bankruptcy.

The lot owners brought this action in state court, requesting that the restriction be declared invalid for several reasons, including: (1) it is inconsistent with the scheme of restrictions established for the entire development; (2) it is vague and uncertain; (3) Fairfield's transfer of approximately 800 unsold lots to Archuletta County under the reorganization plan makes it inequitable to require the remaining lots to pay the fee; and (4) Fairfield's discharge in bankruptcy of its duty to construct certain facilities voids the restriction and makes it unenforceable based on Fairfield's breach of its duties. Appellants' App. at 3.14.

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not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Fairfield removed the action to the federal district court pursuant to 28 U.S.C. § 1452(a), claiming that the lawsuit presented several core proceedings connected to its bankruptcy. The district court found that the matters raised in the state suit were neither "core" nor "related" to the bankruptcy proceeding and ordered the case remanded to the state court. The district court declined, however, to assess attorney's fees under either 28 U.S.C. § 1447(c) or Bankr. R. 9011, finding that the claim of removal jurisdiction was brought in good faith and that there was a fair basis for the position taken by counsel.

Plaintiffs-appellants appeal the district court's decision, arguing that the court's finding that Fairfield acted in good faith reflects the application of an incorrect legal standard, and that they were entitled to fees and costs under the correct standard. Fairfield argues, in response, that the attorney's fees provision of 28 U.S.C. § 1447(c) does not apply to cases removed and remanded under 28 U.S.C. § 1452, which relates specifically to removals for bankruptcy jurisdiction.

We review de novo any statutory interpretation or other legal analysis underlying the district court's decision concerning attorney's fees. *Hoyt v. Robson Cos., Inc.*, 11 F.3d 983, 984 (10th Cir. 1993). The decision whether fees are warranted, however, is reviewed only for an abuse of discretion. *Homeward Bound, Inc. v. Hissom Memorial Ctr.*, 963 F.2d 1352, 1355 (10th Cir. 1992).

After a case has been removed, 28 U.S.C. § 1447(c) requires that the case be remanded if it appears that the district court lacks subject matter jurisdiction. The statute provides further that the "order remanding the case may

require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of removal." We first examine whether this statute applies to cases removed pursuant to 28 U.S.C. § 1452, the bankruptcy removal statute.

Authority for the removal of cases may be found in several statutes. Section 1441 of title 28 is a general removal statute, permitting "defendants" to remove "any" civil action over which the district court has original jurisdiction. Section 1452, on the other hand, allows any "party" to remove cases within the district court's bankruptcy jurisdiction, 28 U.S.C. § 1452(a), that is, proceedings arising under the Bankruptcy Code, or those arising in or related to a bankruptcy case, 28 U.S.C. § 1334(b). Section 1452(b) contains its own remand provision, authorizing the court to remand a removed case "on any equitable ground."

In *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 991-92 (3d Cir. 1984), the court compared the general removal provisions of 28 U.S.C. §§ 1441-1447 to the bankruptcy removal statute, then 28 U.S.C. § 1478 (currently 28 U.S.C. § 1452), and concluded:

> The fact that any attempt to apply the general removal provisions to removals brought under section 1478 would create a number of statutory conflicts and inconsistencies, supports the conclusion that the provisions of sections 1441-1447 were never meant to be read into the procedures for bankruptcy removals. . . . [For example,] section 1441 allows only a defendant to seek removal, whereas section 1478 allows *any party* to remove. Sections 1441-1447, . . . by their own terms, could not apply to matters

> removed by a plaintiff, creating . . . statutory limbo. We decline to read such incongruous results into the legislation.

Id. at 992. Several other courts have adopted this reasoning. *See, e.g., In re Federal Sav. & Loan Ins. Corp.*, 837 F.2d 432, 436 (11th Cir. 1988)(§ 1447(c) applies only to cases removed pursuant to § 1441(a)); *National City Bank v. Coopers & Lybrand*, 802 F.2d 990, 993 (8th Cir. 1986)(28 U.S.C. § 1447(d) precludes review of remand order pursuant to § 1447(c), but not for lack of bankruptcy jurisdiction under 28 U.S.C. § 1334); *In re Boyer*, 108 B.R. 19, 23.25 (Bankr. N.D.N.Y. 1988)(holding that time frames in general removal scheme of 28 U.S.C. §§ 1441-1447 do not apply to bankruptcy removal pursuant to 28 U.S.C. § 1452).

Recently, however, the United States Supreme Court decided *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1148.49 (1992), in which it examined whether the specific bankruptcy appellate jurisdiction granted in 28 U.S.C. § 158 precludes appeals under the more general provision of 28 U.S.C. § 1292. The Court noted that "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Id.* at 1149 (citation omitted). Here, because Fairfield's bankruptcy removal could have been premised on either 28 U.S.C. § 1441(a), which allows removal whenever the district court has original jurisdiction, or on 28 U.S.C. § 1452(a), which specifically authorizes removal of bankruptcy actions, there is no "positive repugnancy" and the two removal statutes simply overlap.

Moreover, the remand provision in section 1452(b) is limited to discretionary remands based on equitable grounds. If this were the only statute to apply, there would be no requirement that cases removed under § 1452(a) be remanded on the purely legal ground that the district court lacks subject matter jurisdiction. Because § 1447(c) requires such a remand, the statutes cover different contingencies, and should both be given effect. For these reasons, the provisions of 28 U.S.C. § 1447(c) apply to cases removed under § 1452(a) as well.

Prior to its amendment in 1988, § 1447(c) simply authorized payment of "just costs" when a case had been "removed improvidently and without jurisdiction." 28 U.S.C. § 1447(c) (superseded). The statute was amended to remove the requirement that the case be removed improvidently and to add authority for an award of attorney's fees. These changes have been interpreted to negate any requirement that the removal be in bad faith before fees can be awarded. *See, e.g., Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993); *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 446 (9th Cir. 1992); *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 923 (2d Cir. 1992). Thus, if the district court had refused to award fees in the absence of evidence of bad faith, it would have employed an incorrect legal standard.

The district court did not, however, employ such a standard. Instead, it made express findings that Fairfield acted in good faith and had a fair basis for removing the case, and then considered such findings in deciding whether fees were warranted. Even after the statute was

amended, "the propriety of the defendant's removal continues to be central in determining whether to impose fees." *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993). Thus, we find no legal error in the standard employed by the district court.

We also hold that the district court did not abuse its wide discretion in declining to award fees and costs. Plaintiffs-appellants base their lawsuit on conditions which either arose prepetition or resulted directly from confirmation of Fairfield's reorganization plan. They seek to remove from Fairfield a source of income which otherwise would be available to pay creditors under the plan. Given the bankruptcy court's postconfirmation jurisdiction over matters affecting the administration, implementation and consummation of the plan, 11 U.S.C. § 1142, its jurisdiction to determine the scope of a debtor's discharge, *e.g.*, *Woodson v. Robintech, Inc.*, 69 B.R. 77, 78 (E.D. La. 1986), and the broad postconfirmation jurisdiction retained by the court in this case, *see* Appellant's App. at 122-25, Fairfield had a legitimate basis for believing the case fell within the district court's bankruptcy jurisdiction. Thus, the district court did not abuse its discretion in declining to award fees and costs under either 28 U.S.C. § 1447(c) or Bankr. R. 9011.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93 N 1767

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, D.A. WHITE & CO. INC., JOAN L. WHITE, d/b/a D.A. White Enterprises,

Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Plaintiffs,

vs.

FAIRFIELD COMMUNITIES, INC., a Delaware corporation; and COLORADO LAND TITLE COMPANY, a Colorado corporation,

Defendants.

ORDER OF REMAND
(Filed Sept. 16, 1993)

The Court has for consideration the plaintiffs, motion to remand this action back to the District Court of Archuleta County, Colorado, from whence defendants have sought removal.

The Court finds that defendant Fairfield Communities, Inc. emerged from Chapter 11 reorganization proceedings in bankruptcy upon entry of an Order Confirming Seventh Amended and Restated Plan of Reorganization for Consolidating Entities, on August 14, 1992, by the United States Bankruptcy Court, Eastern District

of Arkansas, Western Division. That Court retained jurisdiction over disputes affecting the terms of the reorganization in the confirmed plan, as provided by law.

Plaintiffs' action was filed as a class action composed of 2,000 class members, on July 21, 1993, in the District Court of Archuleta County, Colorado. Plaintiffs, complaint seeks a declaratory judgment invalidating an existing restrictive covenant under which Fairfield claims the right to assess annual recreational fees against all lots which it has sold and which are now owned by plaintiffs. Plaintiffs also seek damages and attorney's fees under C.R.S. 38-35-109(3), relating to Fairfield's alleged post-confirmation refusal to release an invalid lien which constitutes a cloud on title to plaintiffs' lots; and refund of invalid fees collected subsequent to the confirmation of Fairfield's plan of reorganization and its discharge from claims, in the August 14, 1992, Order.

Plaintiffs' State court complaint relies on and involves Colorado State law, on significant legal issues of first impression which the State courts should normally decide. Plaintiffs concede that their money claim is limited to damages and refunds for the period subsequent to Fairfield's discharge in bankruptcy. The subject of plaintiffs' claim is not specified as a term in Fairfield's confirmed plan, and the bankruptcy court thus did not and could not retain jurisdiction over this dispute over recreation fee assessments at the Pagosa Development.

The Court specifically finds that the State court complaint is not a "core proceeding" under 28 U.S.C. s 157, and further finds that it is not related to a case under Title 11. Accordingly, the Court must conclude that 28 U.S.C. s

1334 does not confer jurisdiction on this Court; and that this action must be remanded to the District Court of Archuleta County, Colorado. Even if the action could be considered related to a case under Title 11, the mandatory abstention provision in 1334(c)(2) would require remand; and the Court determines that abstention is proper.

IT IS THEREFORE ORDERED that this action be and it is hereby remanded to the District Court of Archuleta County, Colorado forthwith. A certified copy of this Order shall be mailed by the Clerk of this Court to the Clerk of the State court. ~~Plaintiffs' motion for reasonable expenses and attorney's fees is granted, the Court to fix an amount upon plaintiffs' filing of a verified statement of time and expense related to this removal and remand.~~ /s/ EWN

DATED this 16 day of Sept., 1993.

/s/ Edward W. Nottingham
United States Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DALESKE, et al.,	)	
Plaintiffs	)	
vs.	)	93 N 1767
FAIRFIELD COMMUNITIES, INC., et al.,	)	
Defendants.	)	

STATUS CONFERENCE
PARTIAL TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge, for the District of Colorado beginning at 9:15 a.m. on the 16th day of September, 1993, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs: Gerald Sawatzky, Esq.
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

* * *

[p. 27] THE COURT: All right. I'm prepared to rule.

I'm satisfied that the Court ought to remand this case to the Archuleta County District Court. I'm first of all satisfied that the Court lacks subject matter jurisdiction. It's undisputed that there was a discharge and a confirmation of a plan over a year ago, in August of 1992. The petition or complaint here does not seek any relief with [p. 28] respect to that plan, does not seek to litigate claims that arose prior to the plan. It seeks to litigate claims that arose post-confirmation and post-discharge. The claims are all state law claims, arising exclusively, it appears, under Colorado state law.

I find, for those reasons, that the case is obviously not a case arising under Chapter 11, and it also is not a case that is "related to a case arising under Chapter 11." It strikes me that the defendants have chosen a rather roundabout way to accomplish any end here.

If this litigation affects the bankruptcy plan, or affects the bankruptcy estate, or there is an ongoing bankruptcy, in some sense, or if there's been an injunction, as the claim is that there has been, or if there has been – if there is some question concerning the scope of the Bankruptcy Court's discharge, then that can all, I think, be raised very easily, directly with the Bankruptcy Court in Arkansas by way, for example, of a motion to enjoin the proceeding in Colorado.

What's been done here is a Rube Goldberg device that seems to me to be calculated simply to buy time. The suggestion has been made that I send this to our Bankruptcy Court, and that, of course, would result in more delay. Eventually, all I'd get would be a recommendation from our Bankruptcy Court here in Colorado. Then I'd have to take [p. 29] another look at it. That seems to me to be a roundabout way of operating here.

If, indeed, I did have subject matter jurisdiction, which I don't think I do, then this is a case that cries out for remand so that both parties will have the option and means of proceeding directly the way they want to, and not indirectly through the back corridors of this court.

The case is remanded to the District Court for Archuleta County. I've reviewed the order for remand and-tendered by the plaintiff. It does reflect my thinking, except for the matter of attorney's fees. I find that there was a good faith basis for the removal, and that even though substantial attorney's fees were incurred, there was a fair basis for the position that was taken by counsel. Therefore, the request for attorney's fees is denied.

The Clerk will file the order on motion for remand, and it will strike the provision concerning attorney's fees.

Anything further?

MR. SAWATZKY: No, Your Honor.

MR. BAKER: Nothing, Your Honor.

THE COURT: Very well. Court's in recess.

(Whereupon, at 10:08 a.m., the hearing was concluded.)

[p. 30] I certify that the foregoing is a correct transcript from the electronic sound recording of the above-entitled matter.

October 13, 1993 /s/ Carolyn Dahl

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No. 93-1457

Supreme Court, U.S.
FILED
APR 18 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO., INC., and JOAN L. WHITE d/b/a/ D.A. WHITE ENTERPRISES, individually and as representatives of a class of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

v.

FAIRFIELD COMMUNITIES, INC. and COLORADO LAND TITLE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Cirucit

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BRIEF OF RESPONDENT FAIRFIELD COMMUNITIES, INC. IN OPPOSITION

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11 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in holding that the district court did not use an incorrect legal standard and did not abuse its discretion in denying attorneys' fees to Petitioners in connection with a remand of the case?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1457

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO., INC., and JOAN L. WHITE d/b/a/ D.A. WHITE ENTERPRISES, individually and as representatives of a class of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

v.

FAIRFIELD COMMUNITIES, INC. and COLORADO LAND TITLE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT FAIRFIELD COMMUNITIES, INC. IN OPPOSITION

STATEMENT OF THE CASE

On February 28, 1994, the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") affirmed a decision of the United States District Court for the District of Colorado (the "District Court") denying Petitioners' request for attorneys' fees under 28 U.S.C. § 1447(c). The only issue raised in the Petition

for Writ of Certiorari is whether the Tenth Circuit used an inappropriate standard in upholding the District Court's decision.

Petitioners are purportedly property owners at a resort owned by Respondent Fairfield Communities, Inc. ("Fairfield") in Pagosa Springs, Colorado. More than ten years ago, on August 2, 1983, Fairfield recorded a Supplemental Declaration of Restrictions (the "Declaration") with the County Recorder of Archuleta County, Colorado. The Declaration authorized Fairfield to collect a fee from the property owners to help pay for the resort's recreational amenities, such as golf courses, tennis courts and related facilities, and Fairfield has been collecting these fees since 1983.

On October 3, 1990, Fairfield filed a voluntary petition for Chapter 11 bankruptcy relief with the United States Bankruptcy Court for the Eastern District of Arkansas, Western Division. On August 14, 1992, the bankruptcy court entered an order confirming Fairfield's plan of reorganization, which provided that all assets of Fairfield revested in reorganized Fairfield free and clear of all claims, liens, charges or other encumbrances and that all claims, debts, rights, liabilities and causes of action based on any act, omission, transaction or other activity of any kind that occurred prior to the entry of the confirmation order were discharged on the plan's effective date. In addition, the order provided that the bankruptcy court retained broad jurisdiction after the plan's effective date to issue injunctions and other orders to restrain interference with the consummation, implementation or enforcement of the plan.

Ten years after the Declaration was recorded, on July 21, 1993, Petitioners filed a complaint against Fairfield and Colorado Land Title Company in the State District Court of Archuleta County, Colorado. The complaint seeks to invalidate the Declaration and Fairfield's right to collect the recreational amenities fees, and also asserts various other claims, including a request for refunds of certain fees previously paid by Petitioners, an injunction to prohibit Fairfield from collecting outstanding fees, damages and punitive damages.

Fairfield believes that Petitioners' claims arise in or relate to Fairfield's chapter 11 case and, as a result, the Arkansas bankruptcy court has jurisdiction to hear the case under 28 U.S.C. § 1334.[1] Accordingly, Fairfield removed this case to the District Court and intended to request the court to transfer the case to the bankruptcy court. Petitioners responded by moving to remand the case back to state court and requested attorneys' fees in connection with the remand under 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Although the District Court granted the motion and remanded the case, it expressly found that "[t]here was a good faith basis for the removal" and that "[t]here was a fair basis for the position taken by counsel."[2] Accordingly, the District Court denied Petitioners' request for attorneys' fees under 28 U.S.C. § 1447(c).

Petitioners appealed the District Court's denial of their request for attorneys' fees to the Tenth Circuit. The Tenth Circuit found that there was "no legal error in the standard employed by the [D]istrict [C]ourt" and that the District Court did not abuse its discretion in declining to award fees because Fairfield "had a

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[1] It is Fairfield's position that Petitioners' claims arise in or relate to Fairfield's bankruptcy case because, among other reasons, Petitioners seek to (a) abrogate Fairfield's right to collect amenities fees, which right revested in Fairfield free and clear of all claims, charges or other encumbrances upon confirmation of Farifield's plan of reorganization, (b) recover damages, including punitive damages, based on actions that have been taken by Fairfield since 1983, more than seven years before its chapter 11 case was commenced, (c) remove a cloud on Petitioners' title to property that was allegedly imposed in 1983, and (d) rely on an admittedly discharged claim that Fairfield breached certain discharged pre-bankruptcy development obligations.

[2] The District Court made its ruling at a hearing held on September 16, 1983. A transcript of the ruling is attached at pages A-13 through A-15 of the Appendix ("App.") to the Petition for Writ of Certiorari.

legitimate basis" for the removal. The Tenth Circuit opinion is attached at pages A-1 through A-8 of the Appendix.[3]

ARGUMENT

Petitioners incorrectly contend that the legal standard employed by the Tenth Circuit in determining whether to award attorneys' fees under Section 1447(c) is in conflict with decisions of other circuit courts of appeal. The Tenth Circuit's decision, however, uses virtually the same language as, and is completely consistent with, the decisions of other circuit courts with respect to Section 1447(c) attorneys' fee awards.

Petitioners also incorrectly contend that this case presents an important question of federal law which has not been, but should be, settled by this Court. To the contrary, the Tenth Circuit's decision, like those of the Second, Fifth, Sixth and Ninth Circuits, merely ruled that the deletion of the word "improvidently" from Section 1447(c)[4] negated any requirement that a removal must be in bad faith for fees to be awarded. The Tenth Circuit's ruling does not raise an important issue of federal law that requires resolution by this Court. The Petition for Writ of Certiorari should be denied.

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[3] The state district court has since stayed the case to allow the bankruptcy court an opportunity to rule on Fairfield's request for a determination that Petitioners' claims were discharged in bankruptcy and that this case should be permanently enjoined.

[4] Prior to 1988, Section 1447(c) provided that if a case was removed "improvidently", the court could order the payment of costs in connection with remanding the case to state court. The 1988 revision to Section 1447(c) deleted "improvidently" and also authorized a court to award attorneys' fees in addition to costs.

A. The Tenth Circuit Decision In This Case Is Not In Conflict With A Decision Of Another United States Court Of Appeals.

The Tenth Circuit decision is not in conflict with any other circuit court decisions. To the contrary, the Tenth Circuit's ruling upholding the District Court's decision is entirely consistent with other circuit court decisions. The Tenth Circuit properly viewed the District Court's decision as having focused on the "propriety" of the removal, and expressly relied on and cited a Fifth Circuit Court of Appeals decision which held that "the propriety of the defendants' removal continues to be central to determining whether to impose fees". App. at A-8, *quoting Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993).[5] Even Petitioners admit that the Fifth Circuit decision in not in conflict with the Tenth Circuit's decision. Petition at 20.

Moreover, the Tenth Circuit's decision is not in conflict with decisions of the Second, Sixth and Ninth Circuits as suggested by Petitioners. In *Morgan Guaranty Trust Co. of New York v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992), the Second Circuit affirmed a district court's conclusion that Section 1447(c) "requires application of a test of overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties." *Id.* at 924. Similarly, in *Morris v. Bridgestone/ Firestone, Inc.*, 985 F.2d 238 (6th Cir. 1993), the Sixth Circuit expressly agreed with the Second Circuit, emphasizing a district court's broad discretion in awarding fees and concluding that the award at issue was "fair and equitable." *Id.* at 240. Finally, in *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992), the Ninth Circuit also focused on the district court's broad grant of discretion and, like the Fifth Circuit in *Miranti*, quoted the commentary on the 1988 revision to Section 1447(c)

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[5] The Fifth Circuit's "propriety" standard was in turn based on a direct quotation from the Commentary on 1988 Revision by David Siegel following 28 U.S.C.A. § 1447 (West Supp. 1993). *Miranti*, 3 F.3d at 928.

to support the conclusion that fees should be awarded when the removal is found to be "improper." *Id.* at 446.

In sum, in determining whether to award fees under Section 1447(c), the Second and Sixth Circuit decisions described the applicable standard in terms of "fairness" and the Fifth and Ninth Circuit used the term "propriety." The Tenth Circuit in this case utilized the similar words of "fair" and "legitimate" as well as referring to the "propriety" of the removal. Accordingly, the Tenth Circuit's decision is actually consistent, and not in conflict, with the other circuit court decisions on this issue.

B. The Tenth Circuit Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The Tenth Circuit reached two conclusions in this case: (1) that there was "no legal error in the standard employed" by the District Court and (2) that the District Court "did not abuse its discretion in declining to award fees and costs." App. at A-8. With respect to the applicable standard, the Tenth Circuit ruled that the deletion of the word "improvidently" in the 1988 revision to Section 1447(c) negated any requirement that a removal be in bad faith before fees could be awarded. App. at A-7. The Tenth Circuit's ruling in this respect is exactly the same as the rulings of the Second, Fifth, Sixth and Ninth Circuits. *Morgan Guaranty Trust*, 971 F.2d at 923; *Miranti*, 3 F.3d at 929; *Morris*, 985 F.2d at 240; *Moore*, 981 F.2d at 446.

In a misguided effort to demonstrate that the Tenth Circuit decided an important question of federal law, Petitioners argue that the Tenth Circuit incorrectly applied a "frivolousness" standard notwithstanding the 1988 amendment to Section 1447(c). The Tenth Circuit made no such ruling.

First, contrary to Petitioners' assertion, the Tenth Circuit did not use a "frivolousness" standard. In fact, the word "frivolous" never appears in either lower court decision. The District Court used the words "good faith" and "fair basis" and the Tenth Circuit used the words "legitimate basis" to describe the removal. App.

at A-14, A-8. Second, assuming, *arguendo*, that a "frivolousness" standard had been employed by the Tenth Circuit, the decision would not raise an important question of federal law requiring resolution by this Court. Indeed, this Court addressed this same question in another context just last month when it held that, under a similar statute authorizing a court to use its discretion in awarding fees, 17 U.S.C. § 505, factors *specifically including "frivolousness"* may be used to guide the court's discretion. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158, n.19 (U.S. March 1, 1993). By ruling merely that the standard employed by the District Court was not legally erroneous, the Tenth Circuit did not decide an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 18, 1994

(3)

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No. 93-1457

In The

Supreme Court of the United States

October Term, 1993

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO. INC., JOAN L. WHITE, d/b/a D.A. White Enterprises, Individually and as representatives of a class consisting of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

vs.

FAIRFIELD COMMUNITIES, INC., a Delaware corporation; and COLORADO LAND TITLE COMPANY, a Colorado corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In Failing to Give any Practical Effect to the 1988 Amendment of 28 U.S.C. § 1447(c), The Decision Below is in Direct Conflict with the Second and Ninth Circuits

Prior to the 1988 amendment of 28 U.S.C. § 1447(c), attorney fees were held inappropriate where the removal was "fairly supportable" and not in "bad faith". *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). Yet that is the very standard the decision below fixes for attorneys fees *after the 1988 amendment*, i.e. a fee award is inappropriate on finding a "fair basis" and "good faith", demonstrating that the Tenth Circuit gives no actual effect whatever to the amendment.

Respondent's brief in opposition tacitly concedes that the decision below[1] renders meaningless the congressional amendment to 28 U.S.C. § 1447(c), because the amendment is construed as merely negating any requirement that a removal must be in bad faith for costs and attorney fees to be awarded. But respondent's position that other circuits have similarly construed the amendment as having accomplished nothing is plainly in error.

Respondent cannot deny that attorney fees were awardable prior to the 1988 amendment upon a showing of "bad faith" (Pet. at 8). Nor can respondent deny that the word "improvidently" deleted from Section 1447(c) by the 1988 amendment had been treated as equivalent to "frivolously". (Pet. at 9). Nor can it be denied that the former improvidence standard "is clearly less stringent than the 'bad faith' standard . . . " (Pet. at 9).

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[1] The Tenth Circuit's opinion is reported at 17 F.3d 321.

It follows that the Tenth Circuit's novel holding that deletion of "improvidently" from Section 1447(c) in 1988 merely negated a prior requirement of bad faith renders the entire amendment totally meaningless and redundant. Before the 1988 amendment, "just costs" were awardable for "improvident", i.e., frivolous, removals – a standard clearly less stringent than bad faith. Since attorney fees were allowable previously upon a showing of bad faith, and since just costs were allowable for a frivolous removal, deleting "improvidently" was not necessary to "negate" a requirement of bad faith. Merely adding express authority to allow attorney fees in addition to just costs, without deleting the "improvident" requirement, would have negated the old bad faith requirement; but even that was unnecessary since then-existing Rule 11 did not require bad faith to warrant imposition of sanctions in the form of attorney fees. When "improvidently" was deleted, therefore, Congress necessarily intended to abolish the "frivolous" part of the "frivolous or bad faith" standard as well; and thus substantially broadened the right to both costs and attorney fees, without the necessity of finding sanctionable conduct against the removing party.

The Second and Ninth Circuits, in affirming substantial awards of attorney fees in cases remanded to State court, accept this irrefutable logic, in holding that Congress intended to "broaden" the right to attorney fees beyond what was already allowable for Rule 11 violations. *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). *Moore* points out that the pre-1988 amendment rule was that attorney fees were "inappropriate" where the removal was "fairly supportable" and not

in "bad faith", 981 F.2d at 446, which is precisely the rule the Tenth Circuit now utilizes *after* the amendment. In accord is *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau*, 971 F.2d 917, 922, 924 (2nd Cir. 1992), where the court of appeals affirmed the district court award of attorney fees on remand even though the removal was neither improvident nor in bad faith, i.e., had a fair basis and was in good faith. (971 F.2d at 922).

A century ago, long before Congress had inserted the "improvident" requirement into the pre-1988 statute, this Court repeatedly ordered lower courts to award "just costs" against a removing defendant as a matter of course upon remand for lack of Federal jurisdiction. A long line of such cases commences with *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 386-387 (1884). Now that "improvidently" has been deleted and now that Congress has expressly added "actual expenses, including attorney fees" to the "just costs" previously authorized, it would seem logical that "just costs and any actual expenses, including attorney fees" *should all be allowable as a matter of course* because the amended statute makes no differentiation whatsoever between costs and attorney fees.

In this respect, 28 U.S.C. § 1447(c) as an attorney fee statute is unique, as it is also unique in allowing fees only to the non-removing party. The important objectives of Congress in enacting the Judicial Improvements and Access to Justice Act of 1988 are promoted by allowing costs and attorney fees as a matter of course upon remand to State court. (Pet. at 7, note 3). This statute has a broad and frequent application to the entire gamut of Federal question and diversity cases sought to be removed from State courts. State court plaintiffs opposing

remand were intended to be benefitted by the 1988 amendment; a benefit which the Tenth Circuit's present decision prevents and frustrates.

Respondent argues that the Tenth Circuit did not use the word "frivolous" and thus did not intend to approve such a standard for an award of fees. But respondent is unable to refute the self-evident truth that the Tenth Circuit has approved the district court's use of the "frivolous or bad faith" standard for *allowing* attorney fees, by holding that fees should be *disallowed* upon a showing of a "fair basis" and "good faith" for a removal. The court's approval of this old standard is a logical and necessary consequence of the court's error that Congress' deletion of "improvidently" merely negated a bad faith standard – and thus did not negate the former "frivolous" requirement.

Respondent attempts to soften and blur the insidious impact of the lower court's holding by equating the Second Circuit's use of the word "fairness" with the Tenth Circuit's use of "fair basis" for removal. (Br. at 6). This disingenuous suggestion flies in the face of the Second Circuit's and the Ninth Circuit's rejection of and broadening of the pre-1988 test which they described in virtually the same terms as the Tenth Circuit's post-1988 test. Moreover, the Second Circuit used "fairness" in connection with a more specific standard which would broaden the prior right to attorney fees beyond the frivolous or bad faith standard in rule 11, and which would implement the purpose of Congress in making the 1988 amendment. The district court had considered "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties." *Morgan Guaranty*

Trust Co. of N.Y. v. Republic of Palau, 971 F.2d 917, 924 (2nd Cir. 1992). And see, *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). The Tenth Circuit's standard for disallowing fees, on the other hand, was merely the discredited "frivolous or bad faith" standard stated conversely. If a party has an arguable or fair basis for taking a removal, his conduct is nonfrivolous. This is not a proper standard to carry out the broader objectives of Congress even though these tests used to impose sanctions may be considered with other elements in a court's evaluation. Merely passing a frivolous and bad faith test, however, plainly does not warrant denial of costs and fees. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158 (U.S. March 1, 1993).

The record in this case reflects that respondent failed to cite a single court decision to the district court in support of its attempted removal to Federal court; while petitioners presented an array of authorities compelling the conclusion that the State court suit provided no basis whatever for bankruptcy jurisdiction under 28 U.S.C. § 1334. In this arcane area of Federal law, as in many other Federal question and diversity cases, any good lawyer can present rational arguments for Federal jurisdiction. According to the Tenth Circuit decision that standard – held by the Ninth Circuit to be the superseded pre-1988 standard – is enough to avoid an award of attorney fees under 28 U.S.C. § 1447(c).

The Tenth Circuit rule, in short, means that, where it is followed, attorney fees will routinely be denied in virtually all cases remanded for lack of Federal jurisdiction, contrary to the evident and express intent of Congress as reflected in the Legislative History of the Judicial

Improvements and Access to Justice Act of 1988, and in the amendment itself.

The Tenth Circuit concept that an award of attorney fees is punitive in nature is also contrary to Congressional intent, which was to reimburse plaintiffs for wholly unnecessary litigation costs inflicted by defendant, without any suggestion of "sanctions". *Moore v. PermAnente Medical Group, Inc.*, 981 F.2d at 447, *affirming* 765 F.Supp. at 1465.

CONCLUSION

Only this Court can provide a uniform standard rejecting the narrow "frivolous or bad faith" test in order to implement important judicial reform legislation. A decision now would be of great practical assistance to district courts which are constantly considering the remand of cases to State courts.

Respectfully submitted,

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